UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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| UNITED STATES OF AMERICA | : | |
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| v. | : | CASE NO.: 8:03-CR-77-T-30-TBM |
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| SAMI AMIN AL-ARIAN, | : | |
| SAMEEH HAMMOUDEH, | : | |
| GHASSAN ZAYED BALLUT, | : | |
| HATIM NAJI FARIZ | : | |

**GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR MODIFICATION OF RULING ON SCIENTER UNDER 18 U.S.C. § 2339B(a)(1)**

The United States of America submits the following Memorandum of Law in Support of its Motion for Modification of the Court's preceding ruling governing the scienter element of a violation of 18 U.S.C. § 2339B(a)(1).

On March 12, 2004, this Court issued rulings on various defense motions to dismiss the indictment, rejecting most of them. United States v. Al-Arian, No. 8:03-CR-77-T-30TBM, 2004 WL 516571 (M.D. Fla. March 12, 2004). Although the issue of the proper interpretation of Section 2339B's *mens rea* requirement was not squarely addressed in the motions and responses (defendant Al-Arian raised it in his "reply" memorandum, see Doc. 425 at 36-40), this Court determined that "[t]o avoid Fifth Amendment personal guilt problems, [in a prosecution under Section 2339B] the government must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a [Foreign Terrorist Organization] FTO." Al-Arian at *10.

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Because the government has not had the opportunity to address the issue of the scienter element applicable to Section 2339B in the context of the Due Process Clause, and the Court did not have the benefit of the parties' full views on the matter, we respectfully request that it reconsider the portion of its decision.

**Introduction:**
**The United States' Proposed Interpretation of the "Knowingly" Requirement**

Section 2339B provides:

> Whoever, within the United States or subject to the jurisdiction of the United States, *knowingly* provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so shall be [subject to punishment].

(Italics added). Thus, in contrast to Section 2339A, which proscribes providing material support "knowing or intending that [it is] to be used" to commit terrorist activities, Congress made clear that a violation of Section 2339B consists only of "knowingly provid[ing] material support" to an FTO.

As this Court explained in its order, the "knowingly" scienter element "should apply to each of the statutory elements that criminalize otherwise innocent conduct." Al-Arian at *9, (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1999)). Section 2339B has two operative elements: first, the provision of an item or service that falls within the definition of "material support" contained in Section 2339A(b) to a particular entity; second, the entity's designation by the Secretary of State as an FTO. Thus, we propose that the statute requires that a defendant

knowingly provide "material support,"[1] and that he know that the recipient of his support has been designated as an FTO or is an entity that engages in the type of terrorist activity sufficient to merit designation. See Humanitarian Law Project v. U.S. Dept. of Justice, 352 F.3d 382, 401-03 (9th Cir. 2003) ("Humanitarian II") (specifically adopting the second requirement as necessary to protect the statute against constitutional challenge).[2]

The Court interpreted the "knowingly" provision as requiring not only knowledge in connection with both elements, but a specific intent to further terrorist activities committed by the FTO, explaining that it was concerned both with potential vagueness challenges and that the statute should satisfy the due process concept of "personal guilt." Al-Arian at *8-*10. As the Court recognized, Congress intended Section 2339B to prohibit the provision of support to foreign terrorist organizations, to the "fullest possible basis, consistent with the Constitution." Al-Arian at *2. We believe that it is unnecessary to include specific intent to protect the statute against due process challenge. In addition, because defendants cannot raise a colorable vagueness claim on the facts of this case, we believe that the Court need not include specific intent in

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[1] The types of material support are further defined in the statute. They are all of a beneficial nature and, as Congress found and the Court itself pointed out, Al-Arian at * 10, they all further an FTO's terrorist activities, either directly--as in the case of "explosives"--or, because they are fungible and therefore can be used equally well for any purpose, by freeing up other FTO resources to further terrorism.

[2]Currently pending in Humanitarian II is our petition for rehearing en banc regarding this requirement, which asks the Ninth Circuit to clarify that, by requiring knowledge of the nature of the FTO, the court did not intend to require that a defendant know the contents of any classified State Department record supporting the designation.

the statute to bolster it against hypothetical vagueness challenges. Thus, because an interpretation of the statute that stops short of specific intent is consistent with the Constitution, and because the addition of specific intent converts the statute from a general intent statute and thereby does not provide it a reach on the "fullest possible basis" that Congress intended, we ask the Court to reconsider its interpretation.

### A. It is Unnecessary to Interpret Section 2339B as Requiring Specific Intent in Order to Satisfy the Due Process Requirement of "Personal Guilt" Because the Statute Imposes Liability Only for Personal Actions; It Does Not Impute Guilt on the Basis of Association with Others.

The Supreme Court first identified the due process "personal guilt" requirement in Scales v. United States, 367 U.S. 203 (1961), which addressed the constitutionality of the following paragraph of 18 U.S.C. § 2385 (the "Smith Act"):

> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; *or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons,* knowing the purposes thereof–[shall be punished].

The Court stated that it must determine whether the highlighted "membership clause" offended due process by "impermissibly imput[ing] guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct." Id. at 220. As the Court explained, this Fifth Amendment analysis, (although clearly tied to First Amendment concerns because it prohibits "guilt by association"), is "independent" of First Amendment analysis of a statute that proscribes association with an entity. Id. at 225. Punishing a person for

the guilt of those he associates with offends our due process sense of fundamental fairness as well as our understanding that one should be free to associate with others.

The Scales Court concluded that the Smith Act's requirements of both "active" membership and "specific intent" to further the illegal goal of the criminal organization satisfied due process. The "active" membership requirement was "intimately connected" with the statutory requirement that the defendant have "knowledge of the organization's illegal advocacy." Aptheker v. Secretary of State, 378 U.S. 500, 511 n.9 (1963). Thus, the requirement of active membership ensures that a convicted person actually is aware of the criminal activity for which he was being held responsible, although that activity might be conducted by someone else. And the requirement of specific intent ensures that a convicted person harbor some intent regarding others' criminal activities, although he may not have taken any action to further those activities himself.

Scales did not, however, hold that only active membership and specific intent to further criminal activities could satisfy the Fifth Amendment's "personal guilt" standard. Those requirements were simply particularly well suited to a statute that proscribed "[m]embership, without more," in an organization. Scales, 367 U.S. at 225; see also Sawyer v. Sandstrom, 615 F.2d 311, 317 (11th Cir. 1980) ("Scales thus teaches that knowing association with a group cannot be made a punishable act just because some of the group members are engaged in criminal conduct."). Indeed, the United States is unaware of any court that has applied the "personal guilt" standard to require active membership and specific intent in a statute that does not predicate guilt on association.

Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development, 291 F.3d 1000, 1026 (2002) ("[The cases concerning personal guilt] we have discussed supra apply to situations where the government seeks to impose liability on the basis of association alone, i.e., on the basis of membership alone or because a person espouses the views of an organization that engages in illegal activities.").[3] Logically, whenever a statute proscribes personal criminal action, not protected association with criminal actors, the standard is already satisfied, as a defendant under that statute has "concrete personal involvement in criminal conduct" – there is no need to impute to him the guilt of others.

Section 2339B, of course, does not proscribe association with any other organization; it proscribes personally providing material support. See Humanitarian II, 205 F.3d 1130 at 1133; Boim, 291 F.3d at 1026 (2002) ("Conduct giving rise to liability under section 2339B, of course, does not implicate associational or speech rights."); see also H.R. Rep. No. 104-383, at 44 (1995) (stating that the ban on material support "does not attempt to restrict a person's right to join an organization. Rather, the restriction only affects one's contribution of financial or material resources to a foreign organization that has been designated as a threat to the national security of the United

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[3] Defendants assert that the Ninth Circuit in Hellman v. United States, 298 F.2d 810 (9th Cir. 1961), applied a personal guilt analysis "where a person was convicted because of the connection of his conduct to a proscribed organization." Doc. 425 at 37. In Hellman however, the defendant was convicted under the exact same clause of the Smith Act that was at issue in Scales. As defendants' own quotation shows, the court of appeals in Hellman was discussing the defendant's personal conduct not as the criminal *actus reus* proscribed by the statute, but as potential evidence of "active membership" and "specific intent."

States").[4] Thus, there is no Scales concern. Even if Section 2339B were subject to a Scales analysis however, an interpretation of the statute's knowingly requirement to require both knowledge that one is providing "material support" and knowledge that one is providing "material support" to an FTO is sufficient to ensure "personal guilt." There is no need, as there was in Scales, to "make up for" the lack of personal action by requiring a specific intent to further others' criminal activities. A contributor who knowingly provides material support to an organization that he knows is an FTO provides that organization with something that can further its terrorist goals directly or indirectly (by freeing up other resources) -- whether he specifically intends to further those activities or not. That is sufficient to hold him "personally guilty"; it simply does not offend notions of fairness to hold such a person criminally responsible. It is unnecessary, therefore, also to interpret the "knowingly" requirement to require specific intent.

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[4] Defendants attempt to "convert" Section 2339B into an associational statute by asserting that the "gist of the offense" in their case is their association with an FTO. Doc. 425 at 38-39. Defendants misintepret their own case law. The "gist of the offense" relevant to the Scales analysis is the *actus reus* that the statute specifically proscribes. In Scales, that *actus reus* was membership. In our case, it is the provision of material support. Section 2339B simply does not, as defendants claim, proscribe "Al-Arian's alleged association with, and speech on behalf of, the PIJ." Doc. 425 at 39. The fact that the defendants in this case may have associated with and spoken on behalf of the PIJ while committing their acts of material support or in furtherance of that support does not somehow shield the material support itself from prosecution.

### B. It is Unnecessary to Bolster Section 2339B Against Hypothetical Vagueness Challenges by Interpreting the Statute to Require Specific Intent Because the Statute is not Vague as Applied in this Case Even Without That Requirement.

The court also expressed concern that if it did not interpret Section 2339B to require specific intent to further terrorist activities, the terms "financial services," "lodging," "safe houses," "communications equipment" "facilities," "transportation" and "other physical assets" might be unconstitutionally vague. Al-Arian at *9. We believe, however, that the Court's concerns are misplaced because defendants here cannot raise a colorable vagueness claim on the facts of their case.

As the Supreme Court explained in Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994), it is not necessary to analyze whether a provision of a statute is impermissibly vague if a defendant's conduct does not implicate that provision:

> Section 857's application to multiple-use items – such as scales, razor blades, and mirrors – may raise more serious [vagueness] concerns. Such items may be used for legitimate as well as illegitimate purposes, and "a certain degree of ambiguity necessarily surrounds their classification. . . . *This case, however, does not implicate vagueness or other due process concerns with respect to such items.* Petitioners operated a full-scale "head shop" a business devoted substantially to the sale of products that clearly constituted drug paraphernalia. The Court stated in Hoffman Estates; "The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to a Rolling Stone magazine . . . is of no due process significance unless the possibility ripens into a prosecution." 455 U.S., at 503-504, n. 21. Similarly here, we need not address the possible application of § 857 to a legitimate merchant engaging in the sale of only multiple-use items.

511 U.S. at 526 (italics added). See also Young v. American Mini Theaters, Inc., 427 U.S. 50, 58-9 (1976) ("Even if there may be some uncertainty about the effect of the

ordinances on other litigations, they are unquestionably applicable to these respondents. . . . It is clear . . . that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected"); Parker v. Levy, 417 U.S. 733, 753-58 (1974) (disallowing claims that offenses prohibiting "conduct unbecoming an officer" and "disorders and neglects to the prejudice of good order and discipline"are unconstitutionally vague because the defendant's own conduct plainly fell within the ambit of such prohibitions).[5] Likewise, if a defendant's particular conduct clearly falls within the ambit of a particular provision of a statute, that defendant cannot argue that the statute is vague based on hypothetical application of that provision to someone else's conduct. As the court stated in United States v. Sattar, 272 F. Supp. 2d 348 (S.D.N.Y. July 22, 2003), "[a] 'void for vagueness challenge does not necessarily mean that the statute could not be applied in some cases but rather that, *as applied to the*

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[5] See also L. Tribe, American Constitutional Law, 1036 (2d ed. 1988) (explaining that, if a statute applies to "hard core" conduct, but applies only uncertainly to other activities, "[o]ne to whose conduct a statute clearly applies may not challenge it on the basis that it is 'vague as applied' to others").

In its order (Al-Arian at *30 n. 29), this Court expressed the view that the language in Hill v. Colorado, 530 U.S. 703 (2000) precluding vagueness analysis in hypothetical situations not directly at issue was mere dicta. However, we contend that the language in question provided the analytical framework for the Hill Court's rejection of the petitioner's "hypertechnical theories as to what the statute covers." Id. at 733. Further, the language at issue restated well established principles of law governing hypothetical vagueness claims. Id. (quoting, *inter alia*, United States v. Raines, 362 U.S. 17, 23 (1960)). These principles are equally applicable here. Moreover, the statute in question in Hill contained a "knowingly" *mens rea* requirement; the statute at issue here – 18 U.S.C. § 2339B – does so as well.

*conduct at issue in [a] criminal case*, a reasonable person would not have notice that the conduct was unlawful and there are no explicit standards to determine whether the specific conduct was unlawful." Id. at 357 (italics added).[6]

Thus, this Court should be concerned with bolstering Section 2339B against vagueness challenges only to the extent that defendants can legitimately raise those challenges in the context of the allegations in the indictment in this case.[7]

The majority of the defendants' alleged activities – the raising and sending of funds for the benefit of the PIJ in order to assist and promote violent attacks in the Middle East,[8] and providing logistical assistance for terrorist attacks by utilizing communications equipment such as telephones and telephone facsimiles for the PIJ financial transactions and transmittal of information about violent acts[9] – falls squarely

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[6]The Sattar court dismissed the count in the indictment which alleged the provision of "communications equipment" by telephonic transmission of information on behalf of an FTO, only because "[t]he defendants were not put on notice that [their conduct of] merely using communications equipment in furtherance of an FTO's goals constituted criminal conduct." 272 F. Supp. 2d at 358. See also id. at 359 (employing "as applied" analysis to a vagueness claim relating to the provision of "personnel," and distinguishing "hard core conduct," such as service as a soldier, from advocacy or service as a lawyer on behalf of an FTO).

[7] For instance, the court expressed concern that a taxi driver who provides a ride to a member of an FTO or a hotel clerk who registers that member at a hotel may fall within the ambit of Section 2339B. Al-Arian at *9. The taxi driver or clerk, however, must raise his own void-for-vagueness challenge; the defendants cannot raise it for him. See also page 19 of this motion (discussing these hypotheticals).

[8] See Count III para. (3)(a),(s),(u); Count I, overt acts 212, 213, 214, 231, 233, 236, 240, 247 and 253.

[9] See Indictment, Count III at para. (3)(i),(v); Count I, overt acts 229, 233, 238, 239, 240, 247, 249, 251 and 255.

within the heartland of "material support" and leave no room for speculation as to whether they are embraced by the statute.[10] To the extent that this case involves the provision of material support in the form of "personnel"– the term that was found to be impermissibly vague in the Humanitarian Law Project decisions – that term also is not vague as applied to defendants' conduct. The plaintiffs in Humanitarian Law Project brought a civil action challenging the statute because they wished to engage in advocacy on behalf of an FTO. The Humanitarian II Court found that such advocacy

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[10] This Court drew support for its scienter formulation governing Section 2339B from Boim v. Quranic Literacy and Holy Land Foundation for Relief and Development, 291 F.3d 1000 (2002). See Al-Arian at *30 n. 33. That case, however, involved a claim for civil damages under an entirely different statute (18 U.S.C. § 2333) for the death of a U.S. national in a terrorist attack in Israel. The defendants had raised funds for Hamas, the terrorist organization that committed the attack. Id. at 1002-04. While the Boim court required the plaintiffs to prove that the defendants provided funds with the intent to aid Hamas's terrorist activities, see id. at 1028, it did not do so based on an interpretation of the scienter requirement in § 2339B. Rather, the court required proof of specific intent in connection with establishing proximate cause in the tort claim, i.e., that the murder was a reasonably foreseeable result of making the donation, and with its conclusion that § 2333 liability extends to aiders and abettors. Id. at 1012, 1021. It is the definition of aiding and abetting that requires both knowledge of the illegal activity being aided and specific intent, namely, "a desire to help that activity succeed." See id. at 1020 (citations omitted). The court itself acknowledged that discussion of § 2339B was relevant to the case "only to the extent that [§ 2339B] helps define what conduct Congress intended to include in its definition of 'international terrorism,'" and to address the defendants' claim that a § 2333 suit based on violations of § 2339B violates the First Amendment. See id. at 1025. Moreover, the Boim court explicitly cautioned that "the constitutionality of section 2339B is not before us." Id. at 1025. Boim, therefore, lends no support for a similar scienter formulation of Section 2339B. Moreover, we urge this Court to consider that Congress' intent in enacting 2333 (in 1990 and 1992) was to provide a private right of action for damages under tort law. Congress' purpose in enacting 2339B in 1996 was to permit the government the fullest possible basis to prevent any contributions to FTOs. Further, because entirely different issues are involved – in Boim, determining civil liability for aiders and abettors, and in this case, addressing the precise contours of a "knowing" scienter requirement, – we submit that this Court should not be concerned by a perceived incongruity with respect to the element of intent.

would constitute "pure speech" protected by the First Amendment and that it might indeed constitute the provision of "personnel" under Section 2339B; thus, it struck that provision as impermissibly vague. Humanitarian II, 352 F.3d at 404. The government contends that this decision is erroneous even in the civil context,[11] and it certainly does not cast doubt on the constitutionality of the statute in this case. The defendants here can provide no colorable claim that their alleged activities falling within the ambit of providing "personnel" constitute pure speech protected by the First Amendment. They are charged not with speaking on behalf of the PIJ, but with engaging in the management of the financial and executive operations of the PIJ.[12]

In addition, as the Court recognized when imposing its specific intent requirement, if a class of offenses can be made constitutionally definite by a

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[11] The government's petition for rehearing en banc challenges this portion of the Humanitarian II opinion as well. See note 1, supra.

[12] To the extent that the court is concerned with protecting the statute against a "facial" vagueness challenge, that concern also is misplaced. A facial challenge based on vagueness normally cannot succeed because the "general rule" is that the challenger must show that "'no set of circumstances exists under which the Act would be valid.'" Horton v. City of St. Augustine, Florida, 272 F.3d 1318, 1329 (11th Cir. 2001) (citing United States v. Salerno, 481 U.S. 739, 745 (1987)). Thus, when the application of the statute to the challenger's own conduct is constitutional, his facial challenge fails. See Joel v. Orlando, 232 F.3d 1353, 1359 (11th Cir. 2001) ("Joel's facial challenge . . . on vagueness grounds must necessarily fail because his conduct was clearly within the scope of the ordinance's prohibition . . . ."). The Supreme Court has entertained a "facial" challenge when the statute at issue provides no scienter requirement whatsoever, and thus provides both no notice of what conduct it proscribes and no guidance for enforcement. City of Chicago v. Morales, 527 U.S. 41, 56-63 (1999) (striking statute that had been applied to the challenger); see also Hill, 530 U.S. at 732-33 (summarily rejecting vagueness challenge because statute contained "knowingly" scienter requirement and allowed for acceptable degree of enforcement judgment). Section 2339B, of course, contains a scienter requirement without the addition of specific intent.

reasonable construction, the courts are under a "duty to give the statute that construction." United States v. Harriss, 347 U.S. 612, 618 (1954). As the Court recognized in United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. July 11, 2002), however, the phrase "providing personnel" is "readily subject to a narrowing construction" without resort to an additional *mens rea* requirement. To provide "personnel" to an organization ordinarily does not mean to provide pure speech advocacy on behalf of an entity, such as was at issue in the Humanitarian Law Project cases, but rather "to provide people who become affiliated with the organization and work under its direction . . . ." Id. at 577. Such a limitation on the term "personnel" readily avoids potential vagueness concerns. Thus, it is unnecessary to protect Section 2339B against vagueness challenges by also interpreting the statute to require specific intent.[13]

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[13] To the extent the Court's concern that particular statutory terms might "impin[ge] on advocacy rights" is a concern with First Amendment "overbreadth," such a concern also is misplaced. The application of terms like "lodging," etc., to prohibit certain forms of material support simply does not risk chilling a "substantial" amount of First Amendment activity in relation to non-protected activity; thus, those terms cannot be unconstitutionally "overbroad." See Government's Memorandum of Law in Opposition to Defendant Sami Amin Al-Arian's Amended Motion to Dismiss Counts One Through Four of the Indictment (Doc. 346) at 21-23. Indeed, the government submits that, for most of the terms with which the Court is concerned, there is no First Amendment activity that conceivably could fall under them. It is difficult to imagine, for instance, what "lodging" one could provide that would constitute protected speech or association.

In any event, even if terms in the statute like "transportation" and "physical assets" were unconstitutionally overbroad because they somehow chilled substantial amounts of First Amendment activity, interpreting Section 2339B to include specific intent would not save those terms. It is impermissible to proscribe a substantial amount of First Amendment activity whether that activity is engaged in with knowledge, specific intent, or any other level of *mens rea*.

### C. Interpreting Section 2339B to Require Specific Intent to Further Terrorist Activities Unnecessarily Converts the Statute From a General Intent Statute, Thereby Limiting its Allowable Reach in Contradiction of Congressional Intent.

As the Supreme Court explained in Bryan v. United States, 524 U.S. 184, 192-93 (1998):

> the term "knowingly" does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, "the knowledge requisite to a knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." . . . Thus, unless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.

See also Rogers v. United States, 522 U.S. 252, 254 (1998) (opinion of Stevens, J.) (defendant's admitted knowledge that the item he possessed was a silencer was sufficient to satisfy the *knowing mens rea* requirement of 26 U.S.C. § 5861); 1 W. La Fave, Substantive Criminal Law, § 5.2(c) at 349-50 (2d ed. 2003) (noting that, despite the numerous permutations of the word "knowingly," the term "does not require that the conduct be done with knowledge of illegality").

In contrast, "when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'" Bryan, 524 U.S. at 191. Thus, "[m]ore is required . . . with respect to [ ] conduct . . . that is only criminal when done 'willfully.' The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." Id. at 193.[14] Consequently, "[i]n a general

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[14] See also Bryan, 524 U.S. at 191 ("As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, the government must prove that the defendant acted with knowledge that his conduct was unlawful."); W. La Fave

sense [the requirement that the defendant act with a particular] 'purpose' corresponds loosely with the common law concept of specific intent, while 'knowledge' corresponds with the concept of general intent." United States v. Bailey, 444 U.S. 404, 405 (1980). Thus, by requiring proof of "specific intent" (Al-Arian at *10) "that the support would further a particular "bad purpose" – the illegal activities of an FTO," (id.), we are concerned that the Court has transformed Section 2339B from an offense requiring only a "knowing" state of mind, to one requiring a "willful" state of mind.[15]

This conversion does not sufficiently implement Congressional intent, which was "to provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities." AEDPA § 301(b), 110 Stat. 1274. To paraphrase the Supreme Court in Russello v. United States, 464 U.S. 16, 28 (1983) – in enacting Section 2339B, "Congress' concerns were not limited to" the provision of material

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(explaining that "the most common usage of 'specific intent' is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime").

[15]Indeed, as this Court noted at footnote 34 of its order, Congress recently codified the International Convention of the Suppression of the Financing of Terrorism in 18 U.S.C. §2339C. This resulting statute is a specific intent crime, as reflected in the language used by Congress: "Whoever. . .unlawfully and *willfully* provides or collects funds *with the intention* that such funds be used, or with the *knowledge that such funds are to be used*, in full or in part, in order to carry out [specified criminal acts] . . . shall be punished as prescribed . . ."(emphasis added). If Congress had intended Section 2339B to be a specific intent crime, we can presume that it would have used language similar to that in Section 2339C (or 50 U.S.C. §1705 et seq.). See Russello v. United States, 464 U.S. 16 (1983).

support to an FTO specifically earmarked for its terrorist-related activities, but rather embraced "[t]he broader goal" (id.) of denying such an entity the benefit of ***any contribution*** – regardless of its intended purpose since any contribution would result in advancing its terrorist-related objectives. A construction of Section 2339B that conditions the ability to undertake a prosecution for providing material support upon the defendant's *purpose* in making such a contribution thus limits the reach of the statute significantly.

From time to time, courts must interpret a statute to avoid imposing "criminal sanctions on a class of persons whose mental state . . . makes their actions entirely innocent." Staples, 511 U.S. at 614-15.[16] In Staples, for instance, the Supreme Court held that, although the word "knowingly" did not appear in the statute, in order to convict a person for possessing an unregistered automatic weapon, in violation of the National Firearms Act, 26 U.S.C. § 5861, it was necessary for the government to prove

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[16] There is scant authority to support the view that the *Due Process Clause of the Fifth Amendment* limits the ability of the legislature to enact purely regulatory offenses or requires that criminal convictions be based upon offenses that contain a *mens rea* component. The Supreme Court decisions that have construed federal statutes to require a particular level of knowledge or intent have done so almost solely upon the basis of principles relating to statutory construction: (1) the assumption that, in codifying a crime, Congress did not intend to delete the intent element applicable to the offense under the common law (Morrissette v. United States, 342 U.S. 246, 252 (1952)); (2) reluctance to impute to Congress, absent plain language to the contrary, an intent to impose substantial criminal penalties for apparently innocent conduct (see, e.g., Liparota v. United States, 471 U.S. 419, 426 (1985); Staples, 511 U.S. at 618); or (3) the application of the rule of lenity. See, e.g., Liparota, 471 U.S. at 427. It is only in the context of offenses prohibiting the distribution of obscene matter, which might be protected by the *First Amendment*, that the Court has suggested constitutional considerations require imputing to Congress an intent to include a scienter element. See X-Citement Video, Inc., 513 U.S. at 78 (collecting cases).

that the defendant knew the distinctive features the firearm which brought it within the scope of the statute. Id. at 619-20. A different rule, it reasoned would "make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons and [ ] subject them to lengthy prison terms." Id. at 620. In Posters 'N' Things, Ltd., v. United States, 511 U.S. 513 (1994), the Court considered the nature of the *scienter* necessary to support a conviction of a violation of the Mail Order Drug Paraphernalia Act, which, in part, makes it unlawful for any person to offer for sale or transportation in interstate commerce "drug paraphernalia." Rejecting a formulation of the statute that would have required proof that defendant possess the subjective purpose that the paraphernalia actually be employed for use with illegal drugs, the Court reasoned:

> We do not think that the knowledge standard [which it elsewhere imputed to Congress] requires knowledge on the defendant's part that a particular customer will actually use an item of drug paraphernalia with illegal drugs. It is sufficient that the defendant be aware that customers in general are likely to use the merchandise with drugs. . . .
> Finally, although the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs, it need not prove specific knowledge that the items are "drug paraphernalia" within the meaning of the statute. . . . [I]t is sufficient for the Government to show that the defendant "knew the character and nature of the materials" with which he dealt.

Id. at 524-25. See also Hamling v. United States, 418 U.S. 87, 98 n. 8 (1974), (holding that "knowingly" element of statute prohibiting "knowing use of the mails" for the delivery of "obscene, lewd, lascivious, indecent, filthy or vile article[s], matter[s], thing[s], device[s] or substance[s]" "satisfied the constitutional requirements of scienter").

It is sufficient, however, if a statute requires proof of facts that place a person on notice of the "*character and nature*" of the particular materials or activities that make them subject to regulation. Posters 'N' Things, Ltd., 511 U.S. 524-25; see also Staples, 511 U.S. at 609 (requiring knowledge that firearm was a machine gun rather than simply a generic firearm); Hamling, 418 U.S. at 123 (requiring knowledge of the contents of obscene materials). The government's interpretation requires that the defendant, (1) with the knowledge that he was providing "material support," and (2) the knowledge that the recipient was an FTO or an entity that engages in terrorist activities, provide material support to a terrorist organization. Such a defendant would "hardly be surprised to learn" that such a contribution "is not an innocent act." See United States v. Freed, 401 U.S. 601, 609 (1971).[17] Thus, it is unnecessary also to require that the defendant specifically intend to further terrorist activities with his contribution.

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[17] This Court's holding that under Section 2339B a defendant must "have knowledge of the 'material support' element" and that "what he was furnishing was 'material support'" (Al-Arian at *10) may also be understood to require proof that the defendant actually know that his contribution fell within the statutory definition of "material support"in Section 2339A(b). In Hamling, however, the Supreme Court rejected the almost identical argument that, in order to sustain a conviction for purveying pornography, the government must demonstrate that the defendant know the materials at issue fell within the legal definition of the term. It reasoned that, "[i]t is constitutionally sufficient that the prosecution show that a defendant . . . knew the nature and character of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the ["knowingly"] scienter requirement is required neither by the language of [the statute] nor by the Constitution." Hamling, 418 U.S. at 123-24. The same analysis would apply to any *arguendo* requirement that the defendant actually know that the type of support he furnishes to an FTO falls within the statutory definition.

Indeed, this Court gave as an example of sufficient *mens rea* a situation in which a "defendant knows that the organization continues to commit illegal acts and the defendant provides funds to that organization knowing that money is fungible and, once received, the donee can use the funds for any purpose it chooses." Al-Arian at *10. We respectfully submit that this very fact pattern illustrates the application of the "knowingly" scienter as we have proposed, and that the Court need not impose the specific intent standard on the statute to arrive at the same point. To require the defendant in the Court's example also to harbor specific intent to further terrorist activities would be tantamount to a holding in Posters 'N' Things, supra, that, in order to obtain a conviction for distributing drug paraphernalia, the government must prove not only that the defendant was aware of the general purpose of the items he was distributing, but also intended that the purchaser would actually use them as such.

The Court expressed concern that without a requirement of specific intent the statute might apply to persons who engage in routine and minimal business transactions with a member of an FTO--like a taxi driver who ferries a member of an FTO from the airport or a hotel clerk that checks him in for an overnight stay--that the Court believed should not be convicted under the statute. Al-Arian at *9. The Court's hypotheticals point up the importance that Congress assigned to Section 2339B. Congress was determined to "strictly prohibit terrorist fundraising in the United states," and to ensure that this country could not "be used as staging ground for those who seek to commit acts of terrorism against persons in other countries." H.R. Rep. No. 104-383, at 43 (1995) (legislative history pertaining to a bill that was a predecessor of

the Antiterrorism Act). And it specifically found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Section 301(a)(7), 110 Stat. 1247. Thus, it meant to hamstring international terrorism by proscribing all support, even seemingly "minimal" support or support given with the naive intention that it not assist terrorism.

The government would have to prove not only that the cab driver or the clerk interacted with a member of an FTO, but that he both knew that he was providing material support for the member's organization and not simply for the individual acting on his own behalf and that he knew the United States actually had added the organization to the extremely short list of FTOs (or that the organization as a whole had engaged in the type of terrorist activity that merited it a spot on that list), not merely that "the member or his organization at sometime conducted an unlawful activity in a foreign country" (Al-Arian at *9). Once it did, however, those individuals technically would fall within Congress's reach under the statute. Whether a jury might convict on a "*de minimis*" showing of support is, of course, another matter.

## CONCLUSION

In light of the foregoing, we respectfully request that the Court modify its March 12, 2004, decision insofar as it imposes a specific intent requirement upon 18 U.S.C. § 2339B.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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